

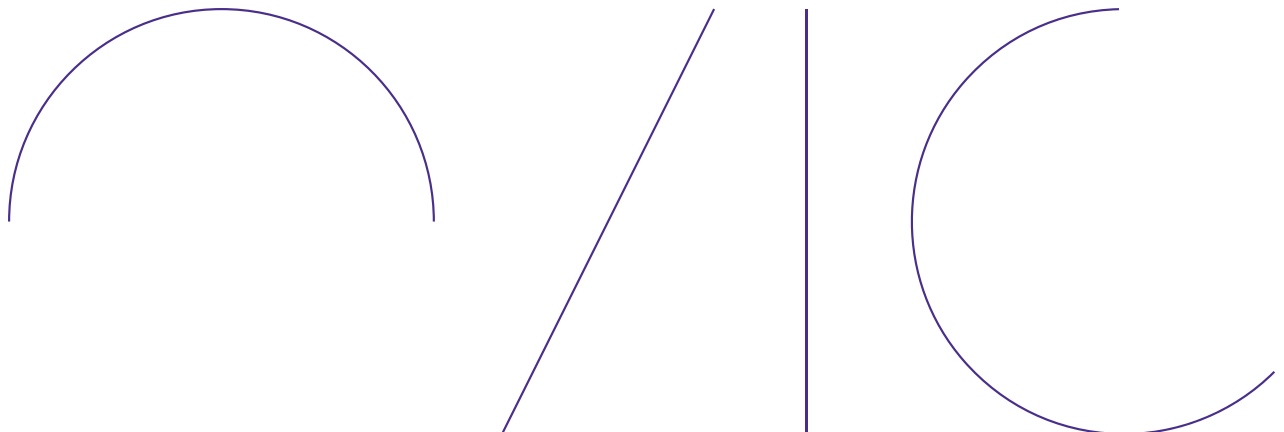


Office of the Victorian
Information Commissioner

Part VIA – Complaints

Freedom of Information Guidelines

FREEDOM OF INFORMATION



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References to legislation

All legislative references are to the *Freedom of Information Act 1982* (Vic) (**the Act**) unless otherwise stated.

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Section 61A – Complaints

Extract of legislation

61A Complaints

- (1) A complaint may be made to the Information Commissioner in accordance with this Part about any of the following—
 - (a) an action taken or failed to be taken by an agency in the performance or purported performance of the agency's functions and obligations under this Act, including a decision by an agency that a document does not exist or cannot be located;
 - (ab) an action taken or failed to be taken by a principal officer in the performance or purported performance of the principal officer's functions and obligations under Part IB or II;
 - (b) a delay by a Minister in dealing with a request;
 - (ba) a decision by a Minister that a document does not exist or cannot be located;
 - (c) an action taken or failed to be taken by a Minister in making a decision under section 24 deferring access to a document;
 - (d) an action taken or failed to be taken by a Minister in making a decision to disclose a document that is claimed to be exempt under section 33;
 - (e) an action taken or failed to be taken by a Minister in making a decision to disclose a document that is claimed to be exempt under section 34;
 - (f) a failure by a Minister to comply with Ministerial professional standards.
- (2) A complaint must—
 - (a) be in writing; and
 - (b) set out the nature of the complaint; and
 - (c) identify the agency, principal officer or Minister concerned.
- (3) A person who may make a complaint may include—
 - (a) the applicant who has made a request to which the complaint relates; and
 - (b) a person or the next-of-kin of a deceased person, if the matter complained of relates to a decision to disclose a document referred to in section 33 containing information relating to the personal affairs of the person or deceased person; and
 - (c) a business, commercial or financial undertaking, if the matter complained of relates to a decision to disclose a document referred to in section 34 containing information relating to matters of a business, commercial or financial nature of that undertaking.

- (4) A complaint must be made within 60 days after the action or conduct complained of occurred.
- (5) The Information Commissioner may accept a complaint made outside the period referred to in subsection (4) if satisfied that the complaint is made out of time because of an act or omission of the agency, principal officer or Minister concerned.
- (6) It is the duty of employees in the office of the Information Commissioner to assist an individual to make a complaint in writing if the individual is otherwise unable to do so.

Guidelines

What can you make an FOI complaint about?

- 1.1. Part VIA outlines on what grounds a person may make a freedom of information (**FOI**) complaint to the Office of the Victorian Information Commissioner (**OVIC**). Part VIA also outlines the Information Commissioner and the Public Access Deputy Commissioner's powers in handling FOI complaints.¹
- 1.2. A person may make an FOI complaint to OVIC about:
 - a delay by an agency or Minister in processing a valid request within the statutory timeframe;²
 - a decision by an agency or Minister that a document does not exist or cannot be located;³
 - inadequate search for documents by an agency or Minister;⁴
 - agency non-compliance with the FOI [Professional Standards](#);⁵
 - non-compliance with Part II;⁶

¹ Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI complaints. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

² [Freedom of Information Act 1982 \(Vic\)](#), sections 61A(1)(a) and (b).

³ [Freedom of Information Act 1982 \(Vic\)](#), sections 61A(1)(a) and (ba).

⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 61A(1)(a).

⁵ [Freedom of Information Act 1982 \(Vic\)](#), section 61A(1)(ab).

⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 61A(1)(ab).

- an agency not providing assistance to an applicant to make a valid FOI request;⁷
- a decision by a Minister to defer giving access to a document;⁸
- an action taken or failed to be taken by a Minister in making a decision to disclose personal or business information (for example, if the person is a third party whose information was released under section 33 or 34, a decision to release the person’s personal or business information);
- any other action taken or failed to be taken by an agency when performing functions under the Act.⁹

Complaint about a delay

- 1.3. [Section 21](#) specifies the statutory timeframe in which an agency or Minister must make a decision in relation to a request. Where an agency or Minister does not make a decision within the statutory timeframe, or the extended timeframe agreed to by the applicant, a complaint can be made to OVIC about that delay.
- 1.4. Where an agency or Minister has exceeded the statutory timeframe, they are taken to have refused access to documents in full (sometimes referred to as a ‘deemed refusal decision’).¹⁰ Where this happens, the applicant can apply directly to the Victorian Civil and Administrative Tribunal (**VCAT**) for review of that deemed refusal decision instead of making a complaint to OVIC.¹¹ Where an applicant makes an application to VCAT in addition to making a complaint to OVIC, OVIC must dismiss a complaint where the subject matter of the complaint has been or could be dealt with by an application for review by VCAT.¹²

For more information on reviews by VCAT, see [section 50\(1\)\(ea\)](#) and [section 53](#).

⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 17(3), section 61A(1)(a).

⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61A(1)(c). For more information about deferring access to a document, see [section 24](#).

⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 61A(1)(ab).

¹⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 53.

¹¹ [Freedom of Information Act 1982 \(Vic\)](#), section 50(1)(ea).

¹² [Freedom of Information Act 1982 \(Vic\)](#), 61B(3).

Complaint about inadequate search for documents

- 1.5. When processing a request, agencies must conduct a thorough and diligent search for documents relevant to the request.¹³ In some circumstances, an agency may locate some documents in response to a request, but the applicant may believe that the agency should have located more documents. When this happens, an applicant may make an FOI complaint to OVIC about their belief that the agency or Minister should have located more documents.
- 1.6. In handling a complaint about an inadequate search for documents, OVIC may require an agency to undertake a further search to locate missing documents.

For more information about when OVIC can require an agency or Minister to conduct a further search for documents, see [section 61GA](#).

Making a complaint to OVIC

Requirements for a valid complaint

- 1.7. A complaint must be made in writing and must:
 - set out the nature of the complaint;¹⁴
 - identify the agency or the Minister to which the complaint relates;¹⁵ and
 - be made within 60 days after the action or conduct to which the complaint relates.¹⁶
- 1.8. If a person is unable to make a complaint in writing (for example, by reason of a disability or other impairment), OVIC will provide them with reasonable assistance to make their complaint in writing.¹⁷

Who can make a complaint?

- 1.9. A person who may make a complaint includes:

¹³ Under [Professional Standard 6.1](#).

¹⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 61(2)(a).

¹⁵ [Freedom of Information Act 1982 \(Vic\)](#), section 61(2)(b).

¹⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 61(2)(c).

¹⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61A(6).

- a person who made an FOI request to an agency or Minister and the complaint relates to that request;¹⁸
- where an agency or Minister makes a decision to release a person’s (or if the person is deceased, their next-of-kin) personal affairs information, that person whose information is the subject of the decision;¹⁹ or
- where an agency or Minister makes a decision to release a person’s business, commercial, or financial information, that person whose information is the subject of the decision.²⁰

How long does a person have to make a complaint?

1.10. A complaint must be made within 60 days of the action or conduct complained of occurring.²¹

For example, if an applicant receives a decision on their request on 1 March 2022 which states no documents relating to their request exist, then the applicant must make a complaint to OVIC before 30 April 2022. The action complained of in this example is the decision that no documents exist.

1.11. OVIC may accept a complaint outside of the 60 day period where OVIC is satisfied that the complaint was made out of time because of an act or omission of the agency, Principal Officer, or Minister.²²

For example, an agency provides a decision to an applicant which advises no documents relevant to the applicant’s request exists, but the decision letter does not include information about the right to make a complaint and when the applicant must do so. OVIC may accept the complaint outside of the 60 day timeframe because the agency did not tell the applicant they could make a complaint and when they need to make one by.

¹⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61A(3)(a).

¹⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 61A(3)(b).

²⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 61A(3)(c).

²¹ [Freedom of Information Act 1982 \(Vic\)](#), section 61A(4).

²² [Freedom of Information Act 1982 \(Vic\)](#), section 61A(5).

Information to provide to OVIC when making a complaint

- 1.12. To assist OVIC in handling complaints, including to assist OVIC in determining the enquiries to make with the agency or Minister, a person making a complaint should provide information to OVIC to support their complaint. This may include providing information to OVIC with their complaint, noting OVIC must deal with their complaint in private in accordance with [section 61F](#).

For example, depending on the nature of the complaint, a person should provide information such as:

- why they believe a document does exist or should have been located;
- why they believe more documents should have been located and why the search was inadequate;
- how the agency has not complied with the Professional Standards;
- evidence of communications with an agency which shows how the agency has not assisted the person to make a valid FOI request.

Making a complaint and applying for a review at the same time

- 1.13. Complainants can make an application for review of an agency's decision at the same time they make a complaint.
- 1.14. However, if the subject matter of their complaint can be, or has been, dealt with by an FOI review, the complaint must be dismissed. For example, in some circumstances, a decision that a requested document does not exist or cannot be located may be dealt with by a review.²³ An agency may decide that some of the requested documents do not exist or cannot be located and also decides that other documents can be found, but are exempt. A person may apply for a review regarding the exempt documents and the complaint will be dealt with as part of the review.

For more information on FOI reviews, see Part VI.

²³ Section 61B(3) requires a complaint that can be dealt with by an application for review be dismissed.

More information

If you're a member of the public and wish to make a complaint, visit OVIC's [guidance on the FOI Complaints Process](#).

Section 61B – Information Commissioner may accept or decline to deal with complaint

Extract of legislation

61B Information Commissioner may accept or decline to deal with complaint

- (1) The Information Commissioner may—
 - (a) accept a complaint to the extent that the complaint relates to—
 - (i) a matter referred to in section 61A(1)(a); or
 - (ia) a matter referred to in section 61A(1)(ab);
 - (ii) a matter referred to in section 61A(1)(b) to (e); or
 - (b) determine not to accept a complaint or dismiss a complaint at any stage.
- (2) Without limiting subsection (1)(b), the Information Commissioner may determine not to accept a complaint or may dismiss a complaint on any of the following grounds—
 - (a) the action or failure by an agency was not in the performance by the agency of its functions or obligations under this Act;
 - (ab) the action or failure by a principal officer was not in the performance by the principal officer of the principal officer's functions or obligations under Part IB or II;
 - (b) the complainant has the right to make a complaint about the action to another body and has not exercised that right;
 - (c) the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith;
 - (d) the complainant does not have a sufficient interest in the subject-matter of the complaint;
 - (e) the complainant has failed to co-operate with the Commissioner in dealing with the complaint without reasonable excuse;
 - (f) the complaint was made after the end of the time permitted to make a complaint;
 - (g) the Commissioner considers that a complaint is not appropriate in the circumstances;
 - (h) the Commissioner is unable to contact the applicant following reasonable attempts to do so.
- (3) The Information Commissioner must dismiss a complaint if the subject-matter of the complaint has been, or could be, dealt with by an application for review by the Information Commissioner or the Tribunal.

- (4) If the Information Commissioner dismisses a complaint, the Commissioner must give written notice to the complainant setting out the grounds for dismissing the complaint.

Guidelines

OVIC may not accept a complaint or may dismiss a complaint

- 1.1. When the Office of the Victorian Information Commissioner (**OVIC**) receives a freedom of information (**FOI**) complaint, OVIC may:²⁴
 - accept the complaint; or
 - not accept the complaint; or
 - accept the complaint and then later dismiss it.
- 1.2. OVIC may choose to not accept a complaint on several different grounds. These are outlined below. OVIC considers each complaint on a case-by-case basis.
- 1.3. If a complaint is not accepted, OVIC will let the complainant know why their complaint has not been accepted and the complaint will not progress any further.
- 1.4. Where a complaint is accepted, OVIC may also dismiss it at any point during the complaint process. The grounds for dismissing a complaint are outlined below.²⁵
- 1.5. If a complaint is dismissed, OVIC will provide the complainant and the agency with a written notice which explains the reasons for the dismissal.²⁶ The complaint will not progress any further if it has been dismissed.

²⁴ Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI complaints. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

²⁵ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(1)(b).

²⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(4).

When a complaint may not be accepted or may be dismissed

1.6. Reasons OVIC may dismiss, or not accept, a complaint include:

- the action or failure by an agency was not in the performance by the agency of its functions or obligations under the Act;²⁷
- the action or failure by an agency was not in the performance of its functions or obligations under Part IB or Part II;²⁸
- the complainant has failed to exercise any right to make a complaint to another body;²⁹
- the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith;³⁰
- the complainant lacks sufficient interest in the subject of a complaint;³¹
- the complainant has, without reasonable excuse, failed to cooperate in dealing with the complaint;³²
- the complaint was made out of time;³³
- the complaint is not appropriate in the circumstances;³⁴
- the complainant cannot be contacted, following reasonable attempts to do so;³⁵ or
- the subject matter of the complaint may be dealt with by application for review by OVIC or the Victorian Civil and Administrative Tribunal (**VCAT**).³⁶

²⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(a).

²⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(ab).

²⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(b).

³⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(c).

³¹ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(d).

³² [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(e).

³³ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(f).

³⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(g).

³⁵ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(h).

³⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(3).

1.7. Some of these are discussed further, below.

1.8. Additionally, OVIC cannot accept a complaint about:

- matters that relate to OVIC’s other functions such as privacy and information security (privacy complaints may be referred under the [Privacy and Data Protection Act 2014 \(Vic\)](#));
- general operations of agencies outside of their FOI functions; or
- complaints about corruption or other similar matters.

1.9. The kind of complaints outlined above cannot be handled through the FOI complaints process, however OVIC may refer complainants to the appropriate body or organisation.

Action or failure was not in the performance of functions or obligations under the Act

1.10. OVIC may dismiss or not accept a complaint if the action or failure by an agency was not in the performance by the agency of its functions or obligations under the Act.³⁷

Example

An applicant makes an FOI request to an agency. The agency considers that the request is not valid and begins consultation with the applicant under section 17 to help them to make the request valid.

The applicant complains to OVIC about a delay in the agency processing the request.

OVIC considers that there has been no delay as the agency has not exceeded the statutory timeframe for making its decision. The agency has not yet received a valid request, and it is still working with the applicant to help them make a valid request.

OVIC does not accept the complaint as OVIC considers the agency has not failed in its performance of its functions under the Act.

The complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith

1.11. OVIC may dismiss or not accept a complaint if the application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith.

³⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(a).

- 1.12. These terms are not defined in the Act,³⁸ however they are often considered in applications for strike out of court and tribunal proceedings. VCAT has said that as a matter of law these words really mean ‘doomed to fail.’³⁹
- 1.13. Section 75 of the [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#) (VCAT Act) allows VCAT to dismiss or strike out a proceeding whether or not it has heard all evidence if, in its opinion, all or part of the proceeding is frivolous, vexatious, misconceived or lacking in substance.⁴⁰ VCAT will only strike out a proceeding under this section if the proceeding is hopeless or unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail.⁴¹
- 1.14. OVIC similarly views dismissal under this section as a very high bar and will only dismiss those applications for review which are obviously bound to fail. This power is only rarely used.

The complainant does not have sufficient interest in the subject matter of the complaint

- 1.15. OVIC may dismiss or not accept a complaint if the complainant does not have sufficient interest in the subject matter of the complaint.⁴²
- 1.16. Having ‘sufficient interest’ can mean an interest which a person other than a member of the general public would hold.
- 1.17. A complainant will be likely to be considered to have sufficient interest if the matter relates to an FOI request the complainant made, or the complainant’s interests, including personal, proprietary, business, economic, social, or political interests are likely to be affected.

The complainant has failed to co-operate without reasonable excuse or OVIC is unable to contact the complainant following reasonable attempts

- 1.18. OVIC may not accept or dismiss a complaint if the complainant fails to co-operate without reasonable excuse or OVIC is unable to contact the complainant following reasonable attempts.⁴³
- 1.19. A complainant has a responsibility to engage with OVIC’s complaints process and to respond to requests for information or documents. Where a complainant does not respond to OVIC or does not provide what is required in a timely manner, OVIC may decide to not accept or may dismiss the complaint unless the complainant provides a reasonable excuse.

³⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(c).

³⁹ *Zeqaj v Ombudsman Victoria (General)* [2010] VCAT 1204; *Lysaght Building Solutions Pty Ltd (t/as Highline Commercial Construction) v Blanalko Pty Ltd* [2013] VSC 201.

⁴⁰ [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#), section 75(1)(a).

⁴¹ *Rein v Australian Health Practitioner Regulation Agency (Human Rights)* [2016] VCAT 1065.

⁴² [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(d).

⁴³ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(e).

1.20. A complainant will have a reasonable excuse where they have an appropriate justification for the conduct (for example, because of a medical issue they have been unable to respond to OVIC within the time requested).

The complaint was made out of time

1.21. OVIC may dismiss or not accept the complaint if it was made out of time.⁴⁴

1.22. A complaint must be made within 60 days after the action or conduct complained of occurred.⁴⁵ However, OVIC may accept a complaint that was made out of time because of an act or omission of the agency, Principal Officer, or Minister.⁴⁶

For more information when a complaint must be made and when OVIC may accept a complaint out of time, see [section 61A – Complaints](#).

The complaint is not appropriate in the circumstances

1.23. OVIC may dismiss or not accept a complaint if it considers the complaint is not appropriate in the circumstances.⁴⁷

1.24. OVIC considers all matters on a case-by-case basis. Circumstances where a complaint may not be appropriate could include:

- the complaint has been pursued to the fullest extent and OVIC determines there is no basis for making further enquiries or investigations (for example, after consultation, the complainant does not provide new or relevant information that warrants making further enquiries with the agency or Minister);
- OVIC determines the agency or Minister has not breached the Act or the FOI Professional Standards;
- where the agency or Minister has taken reasonable steps to correct any error or omission made;
- the agency or Minister has provided a satisfactory explanation for the basis of the complaint;
or

⁴⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(f).

⁴⁵ [Freedom of Information Act 1982 \(Vic\)](#), section 61A(4).

⁴⁶ [Freedom of Information Act 1982 \(Vic\)](#), section 61A(5).

⁴⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(2)(g).

Example

The complaint relates to a decision that documents no longer exist.

The agency explains, and provides evidence to show, that the document was destroyed in accordance with their relevant retention and disposal authority. This explains why the requested document no longer exists.

- the outcome the applicant is seeking is not appropriate or cannot be achieved.

Example

A complainant makes a complaint to OVIC about an FOI request to their local council about a fencing dispute. The outcome they seek is for the fencing dispute to be resolved.

The FOI complaints process cannot achieve this.

The complaint can be dealt with as part of a review by OVIC or VCAT

1.25. If the subject matter of a complaint has been, or could be, dealt with by an application for review by OVIC or by VCAT, then the complaint must be dismissed.⁴⁸

1.26. In deciding whether OVIC must dismiss a complaint under this section, OVIC will:

- identify the subject matter of the complaint (the topic or substance of the complaint, including the relief sought); and
- consider whether the complaint can be 'dealt with' (addressed or resolved) by a review.

1.27. Dismissal will occur at the point when OVIC identifies that the ground for dismissal in section 61B(3) applies.

1.28. This may be:

- when OVIC initially receives the complaint – in this case, OVIC will notify the person of the dismissal in the course of OVIC accepting their review application; or
- after OVIC accepts the complaint and receives more information about it; or
- where the applicant makes a complaint during a review (for example, about the adequacy of the agency's search and/or its failure to identify further documents).

⁴⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61B(3).

Example

An agency decides to refuse access to a document. The applicant applies to OVIC for a review of that decision. The applicant also wishes to complain about the agency's failure to identify further documents in relation to the same request.

OVIC can deal with both the decision to refuse access to a document and the applicant's belief that more documents should have been located, in a review. As part of the review, OVIC can require an agency to conduct a further search for documents if it is not satisfied that an adequate search has been undertaken.⁴⁹

In contrast to a complaint about the adequacy of an agency's search for documents, there are other grounds of complaint that could not be dealt with by an application for review, for example: a complaint about delay.

⁴⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 61GA.

Section 61C – Referral of complaint to another body

Extract of legislation

61C Referral of complaint to another body

- (1) This section applies if the Information Commissioner considers that a complaint could be dealt with more effectively or appropriately by another person or body who or which has jurisdiction to deal with the complaint.
- (2) If the Information Commissioner considers it appropriate to do so, the Commissioner, after consulting with the person or body, may—
 - (a) decline to deal with the complaint; and
 - (b) refer it to the person or body.
- (2A) The Information Commissioner may communicate to a person or body to whom or which a complaint is referred any information obtained or received in the course or as a result of the exercise of the functions of the Information Commissioner under this Part, being information relating to a complaint referred to the person or body.
- (2B) The Information Commissioner may decide to deal with a complaint as if it were a complaint made under the **Privacy and Data Protection Act 2014** if the Information Commissioner considers that the complaint could be dealt with more effectively or appropriately under that Act.
- (3) If the Information Commissioner refers a complaint to a person or body under this section, or decides to deal with the complaint under the **Privacy and Data Protection Act 2014**, the Commissioner must give notice in writing to the complainant.
- (4) The notice must set out the decision of the Information Commissioner and the reasons for the decision.

Guidelines

OVIC may refer a complaint to another body

- 1.1. Under section 61C, the Office of the Victorian Information Commissioner (**OVIC**) may decline to deal with a complaint and instead refer it to another person or body which has jurisdiction to deal with it and who can deal with it more effectively or appropriately.⁵⁰
- 1.2. OVIC may also decide to deal with a complaint under the *Privacy and Data Protection Act 2014* (Vic) (**PDP Act**), if the complaint could be dealt with more effectively under the PDP Act.⁵¹
- 1.3. OVIC may share any information obtained or received relating to the complaint with the body or person to which they have referred the complaint.⁵² This will help the referred body to resolve the complaint more efficiently.
- 1.4. If OVIC decides to:
 - refer the complaint to another person or body with jurisdiction; or
 - deal with the complaint under the [Privacy Data Protection Act 2014 \(Vic\)](#),

OVIC must give written notice to the complainant setting out the grounds for doing so.⁵³

⁵⁰ *Freedom of Information Act 1982* (Vic), section 61C(1). Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI complaints. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as ‘OVIC’ unless otherwise stated.

⁵¹ [Freedom of Information Act 1982 \(Vic\)](#), section 61C(2B).

⁵² [Freedom of Information Act 1982 \(Vic\)](#), section 61C(2A).

⁵³ [Freedom of Information Act 1982 \(Vic\)](#), sections 61C(3) and (4).

Section 61D – Notice of decision to investigate complaint

Extract of legislation

61D Notice of decision to investigate complaint

- (1) If the Information Commissioner accepts a complaint, the Commissioner must notify the principal officer of the agency or the Minister (as the case requires) and the complainant in writing.
- (2) The notice must be accompanied by a copy of the written complaint.
- (3) The Information Commissioner may also notify another person of the complaint if the Commissioner believes that the rights or interests of the person may be affected by the subject-matter of the complaint.

Guidelines

OVIC will notify parties when it accepts a complaint

1.1. If the Office of the Victorian Information Commissioner accepts a complaint, it must write to:

- the principal officer, agency, or Minister to which the complaint relates;
- the complainant; and
- any other person whose rights or interests may be affected by the subject matter of the complaint,

to notify the parties that the complaint has been accepted and to provide a copy of the complaint.⁵⁴

1.2. Writing to the agency or Minister and providing them with a copy of the complaint helps to ensure the parties receive notice of the complaint and the issues it raises so the agency or Minister may respond to them.

⁵⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 61D.

Section 61E – Agency or Minister to co-operate with Information Commissioner

Extract of legislation

61E Agency or Minister to co-operate with Information Commissioner

An agency, principal officer or Minister to which or whom a complaint relates must co-operate with the Information Commissioner in dealing with the complaint.

Relevant FOI Professional Standards

Professional Standard 10.1	An agency must assist the Information Commissioner or Public Access Deputy Commissioner in their attempt to informally resolve a review or complaint.
Professional Standard 10.2	An agency must give consideration to a preliminary view issued by, or on behalf of, the Information Commissioner or Public Access Deputy Commissioner during a review.

Guidelines

Agencies and Ministers must cooperate with OVIC when handling a complaint

- 1.1. Section 61E requires an agency or Minister to cooperate with the Office of the Victorian Information Commissioner (**OVIC**) when dealing with a complaint.⁵⁵
- 1.2. [Professional Standard 10.1](#) also requires agencies to cooperate with OVIC in relation to reviews and complaints by assisting OVIC to informally resolve a review or complaint. This is to facilitate the efficient resolution of complaints and to ensure that all relevant information is made available to OVIC.

⁵⁵ Section 61 sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI complaints. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

Assisting with a complaint

1.3. Agencies and Ministers can cooperate with and assist OVIC by:

- responding to preliminary enquiries promptly and within agreed timeframes – this will help OVIC to determine if the matter can be resolved informally or assist in narrowing the issues in dispute;
- suggesting ways in which a complaint can be resolved;
- participating in the informal resolution process and negotiating in good faith to resolve a complaint informally;
- providing clear and direct responses to requests for clarification or further information
- providing responses as soon as possible;
- avoiding taking an overly technical or adversarial approach to the complaints process.

OVIC may share information between the parties to a complaint

1.4. To resolve complaints as efficiently as possible, OVIC may need to share information between the parties to a complaint. For example, this may include discussing agency responses with, and providing information to, a complainant.

1.5. If information provided by an agency to OVIC cannot be provided to a complainant, the agency should advise OVIC that it is confidential. However, providing as much information as possible is more likely to result in resolving a complaint.

1.6. Where information is provided in confidence, it will not be discussed or shared with a complainant when dealing with the complaint without the agency or Minister's agreement, unless it is required by law.

Section 61F – Complaint must be dealt with in private

Extract of legislation

61F Complaint must be dealt with in private

The Information Commissioner must deal with a complaint in private.

Guidelines

Complaints are handled confidentially

- 1.1. Section 61F helps to ensure the confidentiality of complaints. Information about the complaint is kept between the parties to the complaint (the complainant and the agency or Minister).

For information on when the Office of the Victorian Information Commissioner may share information between the parties, see [section 61E – Agency or Minister to cooperate with Information Commissioner](#).

Section 61G – Preliminary inquiries and consultation

Extract of legislation

61G Preliminary inquiries and consultation

- (1) If the Information Commissioner accepts a complaint, the Commissioner may—
- (a) conduct preliminary inquiries into the complaint; and
 - (b) consult with the agency to which, or the principal officer or Minister to whom, the complaint relates and the complainant; and
 - (c) consult with any other person if the Commissioner believes that the rights or interests of the person may be affected by the subject-matter of the complaint—
in order to determine—
 - (d) the material facts and issues in relation to the complaint; and
 - (e) whether the complaint can be resolved informally.

Relevant FOI Professional Standards

Professional Standard 10.1	An agency must assist the Information Commissioner or Public Access Deputy Commissioner in their attempt to informally resolve a review or complaint.
Professional Standard 10.2	An agency must give consideration to a preliminary view issued by, or on behalf of, the Information Commissioner or Public Access Deputy Commissioner during a review.

Guidelines

Gathering information

- 1.1. When handling a complaint, the Office of the Victorian Information Commissioner (**OVIC**) may conduct preliminary inquiries and consult with an agency, Minister, or any other person whose rights or interests may be affected by the subject matter of the complaint.⁵⁶
- 1.2. OVIC must take reasonable steps to informally resolve a complaint where it can.⁵⁷ Gathering information helps OVIC to decide the material facts and issues and whether the complaint can be resolved informally.

For more information on informally resolving complaints, see [section 61GB – Informal resolution](#).

Conducting preliminary enquiries

- 1.3. After OVIC accepts a complaint, OVIC may invite the agency or Minister to have a preliminary discussion about the complaint and explore options for resolving it. Depending on the agency or Minister's response, OVIC may come back to the complainant for more information or seek the complainant's views on options for resolving the complaint.
- 1.4. If the complaint is incomplete or unclear, OVIC may help the complainant to refine it. OVIC may also contact the complainant and/or the agency or Minister to ask questions about the complaint, or to explore options to resolve the complaint.

More information

For information on working with OVIC during a complaint, see [section 61E – Agency or Minister to cooperate with Information Commissioner](#).

⁵⁶ Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI complaints. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

⁵⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61GB.

Section 61GA – Power to require a further search for documents

Extract of legislation

61GA Power to require a further search for documents

- (1) If, when dealing with a complaint under this Part, the Information Commissioner reasonably believes that an agency, principal officer or Minister has failed to undertake an adequate search for documents that relate to a decision that is the subject of the complaint, the Information Commissioner may give a notice to an agency, principal officer of an agency or Minister to require that agency, principal officer or Minister—
 - (a) in the case of a decision of an agency or Minister under section 25A(1) or (5), to process or identify a reasonable sample of the documents to which the request relates; or
 - (b) in any other case, to further search or to cause a further search to be undertaken for documents in the possession, custody or control of the agency or Minister.
- (2) The agency, principal officer or Minister must comply with a requirement of the Information Commissioner under subsection (1) within the reasonable period stated in the notice, being not less than 10 business days.
- (3) The Information Commissioner, on request of the agency or Minister, may extend the time for complying with a notice under subsection (1).
- (4) The Information Commissioner may specify any reasonable means or method for undertaking a further search under subsection (1)(b).

Example

The Information Commissioner may specify that the agency is required to undertake a search of the agency's email system by searching specified keywords.

Guidelines

Purpose of the section

- 1.1. Under section 61GA, the Office of the Victorian Information Commissioner (**OVIC**)⁵⁸ may give notice:
 - in the case of a decision of an agency or Minister under [section 25A\(1\)](#) or [25A\(5\)](#), to process or identify a reasonable sample of the documents to which the request relates;⁵⁹ or
 - in any other case, to further search or to cause a further search to be undertaken for documents in the possession, custody or control of the agency or Minister.⁶⁰
- 1.2. Section 61GA sets out circumstances in which OVIC may require agencies or Ministers to process a sample of documents or undertake further searches. The power to require further searches is not restricted by the circumstances in section 61GA(1).
- 1.3. The agency or Minister has 10 business days within which to comply with a requirement of the Information Commissioner made under this section,⁶¹ however this time may be extended by a request of the agency and by OVIC's agreement.⁶²
- 1.4. OVIC may specify any reasonable means or method for undertaking a further search.

Example

If an agency decision does not describe the locations searched and a subsequent submission requested does not include a search being undertaken in an area that the complainant believes a document is held, this may result in OVIC requiring a search to be undertaken in that area, either by electronic means via a keyword search, or by conducting a physical search of documents.

⁵⁸ Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI complaints. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

⁵⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 61GA(1)(a).

⁶⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 61GA(1)(b).

⁶¹ [Freedom of Information Act 1982 \(Vic\)](#), section 61GA(2).

⁶² [Freedom of Information Act 1982 \(Vic\)](#), section 61GA(3).

‘Reasonably believes’

- 1.5. If OVIC forms a ‘reasonable belief’ that the agency has not conducted an adequate search, they can order further searches. What is considered ‘reasonable’ will differ according to the context in which it is applied. It will depend on the particular organisation, the information requested, and the circumstances surrounding the request for information.
- 1.6. A reasonable belief is a belief based on facts that would lead a reasonable person to think that something may have occurred.⁶³ It requires more than suspicion but does not require certainty.

Adequate search

- 1.7. An agency’s or Minister’s FOI unit or officer is typically responsible for coordinating a search for documents relevant to a request, and gathering information to assist with assessing located documents.
- 1.8. If an agency or Minister searches for documents in response to a request, it must ensure the search is thorough and diligent. An agency or Minister may be guided by its internal document search policies and practices, at a minimum the agency or Minister must:
 - determine which documents or types of documents the applicant is seeking access to, with reference to the terms of the applicant’s request;
 - identify the most appropriate business area or unit to conduct the search (depending on the applicant’s request and the agency’s or Minister’s record keeping practices, this could involve multiple business units and individuals, including external consultants or businesses engaged or employed by the agency);
 - conduct a thorough and diligent search to locate all relevant electronic and hard copy documents;
 - ensure a record is kept of searches undertaken (see [Professional Standard 6.1](#)); and
 - where relevant, provide a reasonable explanation as to why relevant documents are not in its possession or cannot be located.

⁶³ [George v Rockett \[1990\] 170 CLR 104](#); [Liversidge v Anderson \[1941\] UKHL 1](#).

What does ‘thorough and diligent’ mean?

- 1.9. Conducting a thorough and diligent search means an agency must take all reasonable steps to identify all of the relevant documents in the agency’s possession. Reasonable steps will depend on the circumstances of each request. However, it does not require excessive or extravagant searches to be undertaken. An agency should take a practical and common-sense approach to undertaking a document search with reference to the terms of the request and an understanding of what types of records the agency holds and the agency’s record keeping practices.
- 1.10. A common-sense interpretation of the applicant’s request should be taken to define the scope of the request and the scope of the search to be undertaken. This means an agency should not take an overly technical or narrow approach to interpreting the terms of the request.
- 1.11. It may be useful, and necessary in some cases, to refer to the context in which the documents were created to do this. For example, if the documents relate to a particular incident, this may clarify the types of documents that may exist – such as incident forms, investigation reports, and internal improvement briefings – or it may be the case that no relevant documents exist because no such incident occurred.
- 1.12. Identifying the scope of a request and the context in which relevant documents may have been created will help an agency determine whether it needs to consult internally with one or more business areas. Internal consultation can take some time, so it is important to identify this and consult with the applicant early about the scope of their request.
- 1.13. Similarly, an agency should consider the nature, age and type of documents being requested to assist in determining where and how to search for them. For example, if an applicant seeks access to emails related to a particular agency officer, that officer should be consulted and asked to provide relevant documents.
- 1.14. If an agency cannot locate a document, it may be necessary to consult its internal document destruction policies and relevant retention and disposal authorities issued by the Public Record Office Victoria (**PROV**) to determine whether it was destroyed in accordance with those authorities.
- 1.15. To ensure all relevant places are searched, it is important for an agency to understand where and how documents are stored. Therefore, an agency should ensure it understands its own record holdings and records management systems (including digital, hard copy and archived systems), and identify its document storage policies and practices where relevant.

Consulting internally with business areas

- 1.16. The relevant business area will likely be the subject matter expert for the requested documents. Therefore, it is important to consult early to locate relevant documents, ask questions, and gather contextual information to assist in assessing the documents under the Act.

1.17. When consulting internally, an agency should ensure the relevant business area understands:

- the terms of the request;
- the time frame for responding to the search request (noting the statutory time frame for responding to a request and any extensions of time);
- that all relevant documents in existence at the time the request was made must be provided to the FOI unit or officer for assessment, including documents the business unit may consider are sensitive, marked 'privileged' or 'confidential', draft and duplicate documents;
- multiple document storage systems may need to be searched, including electronic files, hard copy and archived files;
- details of all searches must be recorded ([Professional Standard 6.1](#)); and
- the agency business unit or officer must assist and cooperate with the FOI unit in processing the request ([Professional Standard 9.5](#)).

1.18. To help with assessing the documents under the Act, it is also useful to ask the business area to:

- explain the background and context in which the documents were created (for example, why it was created and its significance); and
- identify any particular sensitivities or concerns with releasing the documents to the applicant.

1.19. While consulting internally can provide helpful and often crucial information to assess a document under the Act, it should not impede the decision-making process, nor cause unnecessary delay.

1.20. In addition, only an authorised officer may make an FOI decision.⁶⁴ The business area cannot direct an agency's authorised officer to make a particular decision ([Professional Standard 8.1](#)).

Reasonable means or method

1.21. OVIC may specify any reasonable means or method for undertaking a further search. For example, OVIC may ask the agency or Minister to search for documents in certain locations or OVIC may specify that the agency or Minister use certain search terms.

⁶⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 26.

Reasonable sample of documents

- 1.22. Where a decision has been made by an agency under [section 25A\(1\)](#) or 25A(5), OVIC may request the agency to process or identify a reasonable sample of the documents to which the request relates. The number and type of documents to be included in the sample is determined on a case-by-case basis and will depend on the number and type of documents likely to fall within the terms of the request.

Section 61GB – Informal resolution

Extract of legislation

61GB Informal resolution

- (1) If the Information Commissioner determines that a complaint can be resolved informally, the Information Commissioner must take reasonable steps to resolve the complaint.
- (2) If the complaint is resolved informally, the Information Commissioner must record the outcome in writing.
- (3) A complainant may take no further action under this Act in relation to the subject matter of a complaint that is resolved informally.

Relevant FOI Professional Standards

Professional Standard 10.1	An agency must assist the Information Commissioner or Public Access Deputy Commissioner in their attempt to informally resolve a review or complaint.
Professional Standard 10.2	An agency must give consideration to a preliminary view issued by, or on behalf of, the Information Commissioner or Public Access Deputy Commissioner during a review.

Guidelines

OVIC may informally resolve a complaint

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**) performs its functions and exercises its powers with as little formality and technicality as possible.⁶⁵ If OVIC decides a complaint can be resolved informally, it must take reasonable steps to resolve the complaint.
- 1.2. Informal resolution involves identifying ways to achieve what the complainant is seeking in the complaint and find an outcome that both the complainant and the agency or Minister are satisfied with.

⁶⁵ *Freedom of Information Act 1982 (Vic)*, section 6G(2). Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI complaints. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

- 1.3. Agencies and Ministers should approach OVIC’s informal resolution process with an open mind, and work with OVIC to resolve the complaint with as little formality and technicality as possible.⁶⁶
- 1.4. Where OVIC resolves a complaint informally:
- OVIC first gets the complainant’s agreement that the complaint is resolved and can be closed; and
 - then confirms in writing the informal resolution and closure of the complaint with both the complainant and the agency or Minister.⁶⁷
- 1.5. If a complaint is informally resolved, the complainant may take no further action under the Act in relation to the subject matter of the complaint.⁶⁸ This means that the complaint cannot be reopened by the complainant.

Reasonable steps OVIC may take to try to informally resolve common complaints

- 1.6. OVIC must take ‘reasonable steps’ to resolve a complaint.⁶⁹ What is considered ‘reasonable’ will depend on the nature of the complaint and the parties involved.
- 1.7. Generally, OVIC’s informal resolution process may include:
- contacting a complainant to find out more about their complaint and clarifying what documents or resolution they are seeking;
 - contacting an agency or Minister to make preliminary enquiries about the complaint and seeking a response;
 - considering information provided by a complainant, agency or Minister, to assess ways to informally resolve the complaint;
 - issuing a preliminary view or resolution options for consideration by the complainant, agency or Minister;
 - following up with a complainant, agency or Minister to obtain further information and propose resolution options for consideration; and

⁶⁶ Section 61E of the Act and Professional Standard 10.1 require agencies to assist OVIC in dealing with a complaint.

⁶⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61GB(2).

⁶⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61GB(3).

⁶⁹ [Freedom of Information Act 1982 \(Vic\)](#), section 61GB.

- identifying and monitoring agency compliance with the Professional Standards through requests for further information or written submissions.

1.8. The sections below outline how OVIC approaches informal resolution of common complaints.

For more information on what you can make a complaint about, see [section 61A – Complaints](#).

Delay

1.9. For a delay complaint, OVIC will ask the agency or Minister for information about the current status of the request, an estimate of when the decision will be made, and the reasons for the delay (for example, workload, staffing resources and other factors).

1.10. The agency or Minister should provide as much information as possible to explain the cause of the delay and when a decision will be made.

1.11. OVIC will use this information to explain to the complainant why the delay has occurred, when they can expect a decision, and what the agency or Minister is doing to progress the request.

1.12. Providing a detailed explanation for the delay, and if appropriate, contacting the complainant to acknowledge and apologise for the delay can help to resolve the complaint.

1.13. OVIC cannot require an agency or Minister to make a decision by a certain date. When OVIC receives a delay complaint, OVIC generally keeps the complaint open until a decision is made or if the complainant applies to the Victorian Civil and Administrative Tribunal on the basis that the agency or Minister is ‘deemed’ to have refused access to their request because a decision was not made within the statutory timeframe.

For more information on deemed refusals, see [section 53\(1\) – Reviews where decisions delayed](#).

1.14. An agency or Minister should engage early and openly with applicants, and be transparent about the time needed to process the request and the potential for delays in providing a decision.

Documents do not exist or cannot be located

1.15. For a complaint about documents that do not exist or could not be located, OVIC will usually make enquiries with both the complainant and the agency or Minister.

1.16. For a complainant, OVIC will ask the complainant to provide information about why they believe more documents exist and should have been located in relation to their request. OVIC will use this information to make targeted enquiries with the agency or Minister.

- 1.17. For an agency or Minister, OVIC will usually ask the agency or Minister to describe how it searched for documents. OVIC may ask an agency for a copy of its document search record.⁷⁰
- 1.18. OVIC will use this information to explain to the complainant why the agency or Minister believes the document does not exist or cannot be located. Or, if OVIC is not satisfied with the agency's or Minister's response, OVIC may request it to provide further information, or undertake further searches for the documents.
- 1.19. The information can assist OVIC to form a view about whether a document is likely to exist or should have been located. This can result in other steps being taken by OVIC, such as requiring the agency or Minister to conduct a further search for documents or making recommendations.

Request does not meet the requirements of section 17

- 1.20. For a complaint about a request that the agency or Minister declined to process because the request did not meet the requirements of [section 17](#), OVIC will ask the agency or Minister for information about the steps taken to assist the complainant to make a request, including copies of communications between the parties.⁷¹
- 1.21. OVIC may also ask the agency or Minister for information to assist the complainant to revise their request so that it meets the requirements of section 17 and can be processed.
- 1.22. OVIC will use the information to explain to the complainant why their request did not meet the requirements of section 17, and provide guidance on what the complainant could do to make a request that can be processed.
- 1.23. In some instances, it can help if the agency or Minister acknowledges where an error was made in handling a request and explains how the agency or Minister has updated its processes to help avoid a similar outcome in the future.
- 1.24. If the complainant is not satisfied with the agency or Minister's response, OVIC may ask the complainant to further explain what kind of outcome they are seeking or to provide more information, if relevant.

⁷⁰ Under [Professional Standard 6.1](#), where a search for documents is conducted, an agency must ensure a record is kept of searches undertaken, including locations searched and the methods or types of searches undertaken.

⁷¹ Under section 17(3), an agency or Minister must assist an applicant make a valid request that meets the requirements of section 17. Further, Professional Standard 2.4 requires an agency to provide notice that a request is not valid, and where possible, provide advice to the person to make the request valid.

Formal mechanisms under the Act

1.25. Where a complaint cannot be resolved informally, OVIC may decide to use formal mechanisms under the Act. These might include:

- conciliating the complaint under [section 61H](#), with the aim of reaching an agreement to resolve the complaint. If the complaint is successfully conciliated, the outcome will be recorded in a written agreement and a copy provided to the agency and complainant;
- requiring an agency to produce documents or attend OVIC to answer questions under [section 61U](#); or
- making recommendations under [section 61L](#) in relation to the complaint, including recommendations to improve policies, procedures and systems.

Reflecting on complaints

1.26. Complaints play a valuable role in:

- restoring trust with members of the public and help to restore relationships between applicants and agencies or ministers;
- leading to better services and outcomes for individuals; and
- identifying ways to improve services for the public.

1.27. Complaints can provide valuable insights into an agency's practices and processes, and may require further action by management, including improvements to existing policies, procedures or service delivery and the need for specified and broader staff training in freedom of information.

1.28. Effective complaint handling and engagement by agencies in the complaints process improves an agency's reputation for being accountable, transparent and responsive to the public.

Section 61H – Conciliation of complaint

Extract of legislation

61H Conciliation of complaint

- (1) If a complaint cannot be resolved informally, the Information Commissioner must use his or her best endeavours to conciliate the complaint.
- (2) If a written agreement is reached between the agency or the principal officer or Minister (as the case requires) and the complainant, the Information Commissioner must resolve the complaint in accordance with the agreement.

Guidelines

Conciliating a complaint

- 1.1. Where a complaint cannot be resolved informally, the Office of the Victorian Information Commissioner must conciliate the complaint.⁷²
- 1.2. While conciliation is still an informal approach to resolving complaints, it may involve steps such as a telephone or face-to-face conciliation conference.
- 1.3. If the complaint is successfully conciliated, the outcome will be recorded in a written agreement and a copy provided to the agency or Minister and the complainant.
- 1.4. If a complaint has been successfully conciliated, no further action may be taken on that complaint.

More information

[Section 61I – Procedure for dealing with complaint if conciliation fails](#)

⁷² Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI complaints. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

Section 61I – Procedure for dealing with complaint if conciliation fails

Extract of legislation

61I Procedure for dealing with complaint if conciliation fails

- (1) This section applies if—
 - (a) the Information Commissioner has tried but failed to conciliate a complaint; and
 - (b) the Information Commissioner is satisfied that there is no reasonable likelihood that the complaint will be resolved by conciliation.
- (2) The Information Commissioner must allow the complainant and the agency or the principal officer or Minister (as the case requires) a reasonable opportunity to make submissions in relation to the complaint, whether orally or in writing.
- (3) The Information Commissioner must deal with the complaint with as little formality and technicality as possible.
- (4) If, after considering any submissions, the Information Commissioner considers that the complaint is unable to be dealt with in accordance with subsection (3) and that further information is required in order for the Information Commissioner to deal with the complaint, the Commissioner may serve on a principal officer, on the officer's own behalf or on behalf of an agency, or a Minister a notice to produce or attend, in accordance with Part VIC.
- (5) The Information Commissioner may rely on advice and assistance provided by a member of staff of the Office of the Victorian Information Commissioner in—
 - (a) conducting preliminary inquiries into a complaint; and
 - (b) otherwise dealing with a complaint; and
 - (c) making recommendations under section 61L in relation to a complaint.

Guidelines

Dealing with a complaint where conciliation fails

- 1.1. Section 61I outlines the process for dealing with complaints if conciliation fails. The section applies if the Office of the Victorian Information Commissioner (**OVIC**) has tried but failed to conciliate a complaint, and there is no reasonable likelihood that the complaint will be resolved by conciliation.⁷³
- 1.2. Dealing with a complaint could include:
 - conducting preliminary enquiries into the complaint;
 - seeking submissions from the parties to the complaint;
 - requiring the agency or Minister to produce a document or provide information;⁷⁴
 - making recommendations in relation to a complaint.
- 1.3. OVIC can rely on the advice and assistance provided by an OVIC staff member. Generally, OVIC case managers handle complaints, including speaking with the complainant and the agency or Minister, seeking submissions, and conciliating the complaint. OVIC staff members may also, in some cases, dismiss complaints.
- 1.4. ‘Reasonable likelihood’ describes a chance or prospect of something happening which is real and not fanciful or remote.⁷⁵ ‘No reasonable likelihood’ in this section means that there is not a real chance that the complaint can be resolved by conciliation.

Submissions

- 1.5. OVIC must allow the complainant and agency or Minister a reasonable opportunity to make submissions. These submissions can be oral or in writing.

⁷³ Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI complaints. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as ‘OVIC’ unless otherwise stated.

⁷⁴ [Freedom of Information Act 1982 \(Vic\)](#), section 61I(4).

⁷⁵ *Council of the Law Society of New South Wales v Levitt* [2018] NSWCA 247.

- 1.6. The complainant's submission should describe the nature of their complaint (what they are complaining about) and provide supporting information to assist OVIC to make enquiries with the agency or Minister.
- 1.7. The agency's or Minister's submission should address the grounds on which the complaint has been accepted, such as reasons as to why an action did not occur within the required timeframe, or an explanation as to how a document search was conducted, or why a document does not exist or could not be located.

Compulsion of attendance or production of documents

- 1.8. If OVIC considers it needs more information to deal with the complaint, it may serve a notice on the principal officer of the agency or a Minister to produce documents or attend to give evidence.

For more information on OVIC's coercive powers, see Part VIC of the FOI Guidelines.

Section 61L – Outcome of complaint

Extract of legislation

61L Outcome of complaint

- (1) After considering the complaint and any submissions and documents received in relation to the complaint, the Information Commissioner may make any recommendations to the agency, the principal officer or the Minister (as the case requires) in relation to the complaint that the Commissioner considers appropriate.
- (2) The recommendations may include suggestions for improvements to the policies, procedures and systems of the agency in relation to compliance with this Act.
- (3) The Information Commissioner must notify the agency, the principal officer or the Minister (as the case requires) and the complainant and any other party to the complaint of the recommendations of the Commissioner to the agency, the principal officer or Minister in relation to the complaint.
- (4) The Information Commissioner must not disclose an exempt document or any information that if included in a document would make that document an exempt document in giving notice under this section.
- (5) If the Information Commissioner intends to make a recommendation that relates to, or a comment about, an agency, principal officer, Minister, person or body, the Commissioner must give the agency, principal officer, Minister, person or body the opportunity to comment on and respond to the draft recommendation or draft comment before making the recommendation or comment.
- (6) The Information Commissioner must take into account any response received by an agency, principal officer, Minister, person or body under subsection (5) in making a recommendation or any adverse comment under this section.
- (7) The Information Commissioner must include in the document containing the Commissioner's recommendations and comments, in a manner that fairly, fully and accurately represents the position of the agency, principal officer, Minister, person or body, any comments received from the agency, principal officer, Minister, person or body under subsection (5).
- (8) If the Information Commissioner determines that the subject-matter of the complaint requires further investigation and is within the jurisdiction of a person or body who or which is prescribed by the regulations for the purposes of this section, the Commissioner may refer the matter to that body for investigation.

Guidelines

Making recommendations in relation to a complaint

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**) may make recommendations regarding a complaint.⁷⁶ This can include making suggestions for improvements to the agency's policies, procedures or systems in relation to compliance with the Act.
- 1.2. Recommendations could include the agency or Minister:
 - conducting a review of its FOI procedures;
 - altering a function or step in its FOI process;
 - amending language on its website or FOI application form.

Notifying parties about a recommendation

- 1.3. OVIC must notify both the complainant and the agency or Minister of a recommendation.⁷⁷ The notification must not include any exempt matter.⁷⁸
- 1.4. If OVIC intends to make a recommendation that relates to, or a comment about, a person or body (including an agency or Minister), OVIC must give that person or body the opportunity to comment on and respond to a draft recommendation or comment.⁷⁹
- 1.5. OVIC must consider any response received.⁸⁰ In OVIC's written recommendation, OVIC must set out any comments received on a draft recommendation or comment, to represent the person or body's position on it.⁸¹

⁷⁶ Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI complaints. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

⁷⁷ [Freedom of Information Act 1982 \(Vic\)](#), section 61L(3).

⁷⁸ [Freedom of Information Act 1982 \(Vic\)](#), section 61(4).

⁷⁹ [Freedom of Information Act 1982 \(Vic\)](#), sections 61L(5).

⁸⁰ [Freedom of Information Act 1982 \(Vic\)](#), section 61L(6).

⁸¹ [Freedom of Information Act 1982 \(Vic\)](#), section 61L(7).

Referring a complaint

- 1.6. If OVIC determines that the subject-matter of the complaint requires further investigation and is within the jurisdiction of a person or body prescribed in the regulations, OVIC may refer the matter to that body.⁸²

Prescribed bodies include the:

- Auditor-General;
- Chief Commissioner of Police;
- Health Complaints Commissioner;
- Independent Broad-based Anti-corruption Commission;
- Victorian Ombudsman;
- Racing Integrity Commissioner;
- Road Safety Camera Commissioner; and
- Integrity Oversight Victoria.⁸³

⁸² [Freedom of Information Act 1982 \(Vic\)](#), section 61L(8).

⁸³ [Freedom of Information Regulations 2019](#), Schedule 2.

Section 61M – Complaints notified or referred by other bodies

Extract of legislation

61M Complaints notified or referred by other bodies

The Information Commissioner may treat a complaint—

- (a) notified by the Ombudsman under section 16G of the **Ombudsman Act 1973**; or
- (b) referred by the Health Complaints Commissioner under section 51 of the **Health Records Act 2001**—

as if it were a complaint made under section 61A.

Guidelines

Complaints referred by the Ombudsman or the Health Complaints Commissioner

- 1.1. In certain instances, the Ombudsman or the Health Complaints Commissioner may refer complaints made under the [Ombudsman Act 1973 \(Vic\)](#) (**Ombudsman Act**) and the [Health Records Act 2001 \(Vic\)](#) (**Health Records Act**), respectively, to the Office of the Victorian Information Commissioner (**OVIC**).⁸⁴
- 1.2. OVIC may deal with a complaint referred to it by the Ombudsman or the Health Complaints Commissioner as if it was a complaint made under [section 61A](#).⁸⁵ This helps to ensure the most relevant and appropriate body deals with FOI complaints even where the complaint is made under a different Act.
- 1.3. If a complaint is referred under either Act, the relevant body must notify both OVIC and the complainant.

⁸⁴ Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI complaints. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

⁸⁵ [Freedom of Information Act 1982 \(Vic\)](#), section 61M.

Example

Section 16G of the Ombudsman Act requires the Ombudsman to notify OVIC of a complaint if the complaint could be made under Part VIA.⁸⁶ If the Ombudsman notifies OVIC, then the Ombudsman must also notify the complainant.⁸⁷

Section 51(3)(bb) of the Health Records Act allows the Health Complaints Commissioner to refer a complaint to OVIC if an act or practice complained about could be the subject of a complaint under Part VIA. If the Health Complaints Commissioner does so, then they are required to notify both the respondent and the complainant.⁸⁸

⁸⁶ [Ombudsman Act 1973 \(Vic\)](#), section 16G(1).

⁸⁷ [Ombudsman Act 1973 \(Vic\)](#), section 16G(2).

⁸⁸ [Health Records Act 2001 \(Vic\)](#), section 51(3).

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